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IN THE

Supreme Court of the United States

October Term, 1948.

No. 110

LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOHN STRONG, THOMAS HICKEY, SAMUEL GRASSO, ANDREW GAZZILLO and THEODORE SCHULZ,

Petitioners,

AGAINST

MOTOR HAULAGE COMPANY, INC.,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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Brief of Respondent in Opposition to Petition for Writ of Certiorari.

Statement.

The proceedings to which the Petition for a Writ of Certiorari is addressed arise under the Arbitration Law of the State of New York (Article 84 of the Civil Practice Act, State of New York).

And the facts are clear: Respondent, Motor Haulage Company (hereinafter called the "Respondent") and the petitioner, Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen And Helpers of America (hereinafter called the "Petitioner Union"), were parties to a collective labor agreement

which provided, without any exceptions or limitations, that all "disputes and controversies arising under or in connection with the terms or provisions" of the agreement or its "application or interpretation of any of the terms or provisions" were to be submitted to "Hugh E. Sheridan as the Impartial Chairman, whose decision shall be final and conclusive on all parties" (fols. 186-189, p. 4 of booklet)*

On April 9, 1946, members of Petitioner Union and the shop steward designated by the Union, called and participated in an illegal strike against Respondent. The Company demanded arbitration and damages for losses incurred as a consequence of the illegal strike. After a hearing, upon notice, at which Union representatives appeared and participated, the Arbitrator awarded the Respondent $4,161.88. Under the terms of the collective agreement, the Arbitrator was authorized by both parties to render a money award (fols. 186-189, p. 7 of booklet).

On or about the 21st day of February, 1947, the Respondent moved to confirm the arbitrator's award at a Special Term of the Supreme Court of the State of New York. The motion for confirmation was denied. On appeal, the Appellate Division of the Supreme Court reversed Special Term and granted the Respondent's motion to confirm. Thereafter, the Petitioner Union appealed from the order and judgment of the Appellate Division, to the Court of Appeals of the State of New York. In an opinion, *per curiam*, the Court of Appeals found no error in the decision of the Appellate Division but reversed the judgment on the ground that the action could not be maintained against the Petitioner Union in its common name as an unincorporated association. Accordingly, the Court of Appeals directed that the irregularity in the caption of the proceedings be corrected as

*All references, unless otherwise noted, are to folios in the papers on appeal in the Appellate Division.

permitted by Section 105 of the Civil Practice Act, State of New York.

The Respondent then moved at a Special Term of the Supreme Court to amend the notice of motion in its proceedings to confirm the award by substituting, for the unincorporated association as plaintiff, the names and titles of the President and Secretary and Treasurer of the Union, in their respective representative capacities. This motion was granted and the order and judgment were affirmed by the Appellate Division of the Supreme Court of New York, after an appeal by petitioners John Strong and Thomas L. Hickey, officers of the Petitioner Union.

On or about April 4, 1949, the petitioners Strong and Hickey, officers of the Petitioner Union moved the Court of Appeals for the State of New York for leave to appeal. On April 20, 1949, this motion was denied by the Court of Appeals. *It is significant that at no time, other than incidentally in the motion for leave to appeal, did the Union urge, as it does here, that service was defective.*

The Petition.

Petitioners, *which include persons not parties to this proceeding*, urge the following reasons for the granting by this Court of a Writ of Certiorari:

1. No process was served upon the Union or upon any of its officers or members, and, accordingly, the entry of judgment is a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

2. A recovery may be had against a Union under Section 13 of the General Associations Law of the State of New York only upon proof that *all* of the members of the Association participated in the complained-of act.

3. A Union does not bind its members by executing an arbitration agreement which, consonant with the Arbitration Law of the State of New York, includes a waiver of a trial by jury. Since all the members of the Petitioner Union were not parties to the agreement with the Respondent, they are not bound by the agreement made by their Union. Moreover, say Petitioners the arbitration procedure as applied to them is unconstitutional.

4. The arbitration award should have been vacated by the New York Court because of the charge of corruption on the part of the Arbitrator. Failure of the Court to try that charge, amounted to a denial of due process.

5. The Petitioners were denied equal protection of the law in that the award was rendered against the Union only because it was a labor union and that a like award would not be rendered against a business association.

6. The arbitrator's award violates Section 6 of the Norris-LaGuardia Act and, therefore, subverts a national policy binding upon State courts.

Respondents respectfully submit that there is no merit to the alleged grounds for granting the Writ.

Summary of Respondent's Argument.

The petition and supporting brief is a challenge to the wisdom of state legislation and an attack upon state procedure. No federal right was asserted by Petitioners in the State Court and no decision made upon a federal question. Petitioners challenge State Court procedure and for all of the reasons hereinafter set forth no reviewable question is presented to this Honorable Court.

POINT I.

The State Court had jurisdiction over the Petitioner officers of the Union by reason of their general appearance.

Petitioners urge, repeatedly, that no process was served upon the Respondents, John Strong and Thomas L. Hickey, officers of the Union. Respondent concedes that notice of the initial motion to confirm the award was served upon the attorneys for the Union rather than upon the President or Treasurer of the Union. The attorneys for the Union not only entered into stipulations on behalf of the Petitioner Union, but actively appeared and participated in all of the proceedings with the knowledge and authorization of the Union. More significantly, on the motion to amend the caption, and to confirm the arbitrator's award, the attorneys for Petitioners Strong and Hickey *appeared generally.* And on the appeal to the Appellate Division of the Supreme Court, the attorneys for the same Petitioner again appeared *generally.* And precisely the same appearance was made in the motion for leave to appeal to the Court of Appeals. Moreover, the Union and its officers participated in every stage of the court proceedings without objection to the alleged defective service, except upon the motion for leave to appeal to the Court of Appeals.

The motion to amend the caption and to confirm the award was a statutory proceeding, in the nature of an action, leading to an order and final judgment. On such a motion, an objection to jurisdiction on the ground of improper service, may be asserted by a *special,* as distinguished from a *general,* appearance.

Braman v. *Braman,* 236 App. Div. 164, 258 N. Y. S. 181;

Citizens Trust Co. of Utica v. *R. Prescott & Sons,* 221 App. Div. 420, 223 N. Y. S. 184.

Assuming, *arguendo*, that the service upon the attorneys was ineffective to confer jurisdiction over the Union, the *general appearance* of the Petitioners was an unequivocal waiver of the sufficiency or regularity of service of process.

> *Ogdensburgh And Lake Champlain Railroad Company* v. *Vermont And Canada Railroad Co.*, 63 N. Y. 176;
> *Reichel* v. *Standard Rice Co. Inc.*, 225 App. Div. 628, 234 N. Y. S. 137;
> *Freeman* v. *Freeman*, 126 App. Div. 601, 110 N. Y. S. 686;
> *Layton* v. *McConnell*, 61 App. Div. 447, 70 N. Y. S. 679;
> *Onondaga Hotel Corporation* v. *Gurny* (2nd) 62 N. Y. S. (2d) 550.

Indeed, service was properly made. Section 1461 of the Civil Practice Act of New York provides, in part, that service may be effected upon the attorneys for the adverse party:

> "Notice of the motion must be served upon the adverse party *or his attorney*, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court." (Emphasis supplied.)

In the State of New York, jurisdiction over the person of a defendant may be secured either by personal service upon him of the summons and complaint or by a general appearance. Thus, one who becomes an actor in the proceedings in any stage by participating in the controversy on the merits is held to have appeared generally and defects of service are waived.

Feinberg v. *Enselberg,* 185 Misc. 358, 56 N. Y. S. (2d) 741;
Jorgebloed v. *Erie R. Co.,* 180 Misc. 893, 42 N. Y. S. (2d) 260;
Merchants Heat & Light Company v. *J. B. Clow & Sons,* 204 U. S. 286, 290, 51 L. Ed. 286;
Farmer v. *National L. Association,* 138 N. Y. 265;
Reed v. *Chilson,* 142 N. Y. 152;
Henderson v. *Henderson,* 247 N. Y. 428, 160 N. E. 775.

Thus, Section 237 of the Civil Practice Act, State of New York, prescribes that a voluntary general appearance of the defendant is equivalent to personal service of the summons upon him.

In *Hill* v. *Mendenhall,* 88 U. S. 453, 22 L. Ed. 616, the attorney for the party rather than the defendant was served. This Court held:

> "It is true that the record sued upon in this case does show that defendant was not served with process, but it also shows a voluntary appearance by his attorney. If this appearance was authorized, it is exactly for the purposes of jurisdiction as the actual service of the summons. When an attorney * * * appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed. A record which shows such an appearance will bind a party until it is proven that the attorney acted without authority."

Petitioners now seek to attack the jurisdiction of the New York Courts even though they remained to debate

the merits at six different stages of the proceedings. Obviously, there is no merit to Petitioners' contention.

> *Dyker Heights Home for Blind Children, Inc.* v. *Stolitzky,* 250 App. Div. 229, 294 N. Y. S. 15.

To suggest, as do Petitioners, that they were denied due process because of the absence of personal service upon them is to commit the error of reading into the Fifth and Fourteenth Amendments to the Constitution, a guarantee of a particular form of procedure.

> *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 82 L. Ed. 1381.

In *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 343, 81 L. Ed. 1143, this Court said:

> "The immediate question is whether the authorized proceeding affords a fair and adequate remedy. We accordingly inquire whether the prescribed procedure gives an opportunity for a fair hearing in determination of all questions of fact and adequately provides for the protection of the legal rights of the claimant, embracing whatever right of refund the claimant is entitled to assert under the Federal Constitution."

If there be notice, a hearing and participation, the requirements of due process are satisfied. A correct decision is not an element of due process; a fair hearing is all that is required.

> *Central Land Company* v. *Laidley,* 159 U. S. 103, 40 L. Ed. 103.

In *Ownbey* v. *Morgan*, 256 U. S. 94, 65 L. Ed. 837, this Court held:

> "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall."

Accordingly, if the court "has jurisdiction and acts not arbitrarily but in conformity with the general law, upon evidence and after inquiry made with notice to the parties affected, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with."

Twining v. *State of New Jersey*, 211 U. S. 78, 53 L. Ed. 97;
Roller v. *Holly*, 176 U. S. 398, 44 L. Ed. 520;
Pennoyer v. *Neff*, 95 U. S. 714, 24 L. Ed. 565;
Hess v. *Pawlowski*, 274 U. S. 352, 71 L. Ed. 1091.

In *Western Life Indemnity Co. of Illinois* v. *Rupp*, 235 U. S. 261, 59 L. Ed. 220, the defendant corporation was served by substituted service under State Law. The corporation appeared specially to contest jurisdiction and also to debate the merits. The judgment for the defendant was reversed on appeal. The Court of Appeals of Kentucky held that the defendant had waived the special appearance by participation in the merits. On the appeal to the Supreme Court, defendant claimed that the Kentucky rule violated the due process clause of the Constitution. Affirming the decision of the Kentucky Court, this Court said:

> "That a State, without violence to 'the Due Process' Clause of the Fourteenth Amendment,

> may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of defendant, is settled by the decision of this court in *York* v. *Texas,* 137 U. S. 15, followed by *Kauffman* v. *Wotters,* 138 U. S. 285."

The Arbitration Law of New York neither confers nor abridges rights of action. Since its sole objective is the regulation of remedies it is procedural, rather than substantive, in context and content. An arbitration agreement provides for remedies rather than substantive rights. Hence, the determination of the validity of an arbitration agreement is a matter peculiarly reserved for the State courts.

California Prune & Apricot Growers Ass'n v. *Catz American Co.,* 60 F. (2d) 788;

United States Asphalt Refinery Co. v. *Trinidad Lake Petroleum Co., Limited,* 222 F. 1006;

Berkovitz v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, 130 N. E. 288;

Marine Transit Corp. v. *Dreyfus,* 284 U. S. 263, 76 L. Ed. 282;

Red Cross Line v. *Atlantic Fruit Company,* 264 U. S. 109, 68 L. Ed. 582;

Merchant v. *Meade-Morrison Mfg. Co.,* 29 F. (2d) 40 (interpreting New York Law).

POINT II.

Under the law of the State of New York a judgment against a Union may be collected out of the common treasury of the Union even if all the members did not participate in the complained-of act.

Petitioners do not deny that the collective bargaining agreement which contains the arbitration clause was ratified by the members of the Union. But they propose a new principle: namely, that a common treasury may not be reached to satisfy a judgment unless *all* of the members participated in the complained-of act. Petitioners' error arises out of a misconstruction of Sections 12, 13 and 16 of the General Association Law of New York.

Section 13 provides that suit may be maintained against the president or treasurer of an unincorporated association when the liability of the members is either *joint* or *several*. Consequently, the act of officers and directors of a trade union authorized by the membership is binding upon all of the members (even though there be dissenters) and the common treasury of the union may be reached in an action for damages to satisfy the joint liability of the members.

People v. *Brotherhood of Painters, Decorators and Paper Hangers of America*, 218 N. Y. 115, 112 N. E. 752;
Meinhart v. *Contresta*, 194 N. Y. S. 593;
Bobe v. *Lloyd*, 10 F. (2d) 730 cert. den. 270 U. S. 663.

"The purpose of this section is obvious; prior to its adoption, if one would bring an action against an association it would have been necessary to bring in as parties all the individual members of the association, on the theory of a part-

> nership. This requirement was such that in many instances it amounted to a denial of justice, and it was to avoid the inconvenience and the injustice of such a situation that this section was adopted authorizing action against the president or treasurer of the association. An action may be brought against either of these officers not in their individual but rather in their representative capacity."
>
> *Hagan* v. *Bricklayers' etc. Union No. 28,* 143 Misc. Rep. 591, 256 N. Y. S. 898.

A complete answer to the contention of the Petitioners is provided in *Glauber* v. *Patof,* 183 Misc. 400, 47 N. Y. S. (2d) 762. In that case an action was brought by plaintiff for reinstatement as a member of the defendant union and for damages because of illegal expulsion from membership. Suit was brought against the president of the Union as prescribed in Section 13.

The plaintiff was expelled by action of the grievance committee. Defendant objected to the claim for damages on the ground that the Union:

> "is not liable to pay the losses of an expelled member unless all the members of the association are liable, and all the members are not liable here."

The Court held:

> "There is no question but that an action may not be maintained against an association under section 13 of the General Association Law, unless the evidence establishes that all the members of the association are liable, either jointly or severally, to pay the plaintiff the amount of his claim. Liability is, of course, a legal consequence. The question in each case is whether that consequence follows from the facts of the case."

Under the by-laws of the Union, the power of expulsion was vested in the grievance committee, but it was also prescribed that the general membership should be advised by action of the committee by a reading of the reports of committees at all general meetings. Plaintiffs were expelled at a meeting of the grievance committee held on January 22nd, 1943. The next general meeting of the association was held on February 8th, 1943. The testimony shows that neither the minutes nor the report of the grievance committee were read, but that there were questions from the floor as to why the plaintiffs were discharged. The Court there held:

> "The members of the association undertook by their contract of association to fix the terms of membership and to exercise the power of expulsion by delegating that power to the grievance committee, and, being mindful of the important power they had vested in the committee, provided, in order to exercise the necessary control over committees, that reports of committees should be made at each meeting of the general membership. It would not seem too much to require the membership in such case to assume responsibility for the actions of its duly-constituted agents."

Now, of the total members of 89, there were 45 members present at the general meeting of February 8th. The Court said:

> "Counsel for the defendant argued at the trial that notice to a majority of the membership was not enough, that notice must come to the personal attention of every member, and acknowledged that in his view a membership association might always exempt itself from liability by having one

> member absent himself from meetings. While it is difficult to define with satisfactory preciseness the necessary quality and quantity of notice to the general membership to make an association liable, it can at least be said that the contention of the defendant is as far from being the law as it is far from reality."

The Court concluded:

> "If the membership sees fit to delegate the power of expulsion to a committee, it should not be too much to require the membership as a whole to assume responsibility for the actions of the committee. The decision in this case need not rest on such general principles, however. It rests upon a finding that there was bad faith on the part of the membership as a whole in countenancing the expulsion of the plaintiffs upon the record which was before the general meeting on February 8, 1943."

Thus, the Court had found that even though there were only 45 present at the meeting, the entire Union was liable.

Section 12 of the General Associations Law is companion to Section 13. The language of the two sections are identical except that Section 12 applies to actions or proceedings *by* an unincorporated association and Section 13 deals with actions or proceedings *against* an unincorporated association. If the suggested interpretation of Section 13 is correct, then a like interpretation must be given to Section 12 and if such an interpretation is adopted, then under Section 12 a labor union can never institute a suit in the name of its president or treasurer unless each of the members was separately,

individually and personally damaged. Obviously, such a construction would vitiate the rights of a labor union to come into the courts. But the courts of this State have uniformly rejected such a construction.

In *Kirkman* v. *Westchester Newspapers, Inc.*, 261 App. Div. 181, 24 N. Y. S. (2d) 860, the Union instituted suit through its president to recover damages for libel. The libel concerned only the character of the officers of the union. The Court there held that the rule in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975, prescribing that a trade union could only be sued or sue in the names of its members and liability had to be enforced against each member, was no longer the law in this state. Thus says the Court:

> "In this State, a labor union may sue and be sued as provided in Sections 12 and 13 of the General Associations Law (added by Laws 1920, c. 915). A judgment obtained against the Union may be enforced against the personal or real property belonging to the association owned jointly or in common by all of its members (General Associations Law, Sec. 15). Thus, an action brought against the president of a labor union pursuant to Section 13 of the General Associations Law while nominally against him actually is against the association. *Thomann* v. *Flynn*, 251 App. Div. 325, 295 N. Y. S. 577; *Kelso* v. *Cavanagh*, 137 Misc. 653, 657, 244 N. Y. S. 90, opinion by Untermyer, *J.*"

The argument advanced by the petitioners here was precisely the argument submitted by the defendant in the cited case. However, the Court held:

> "Appellants argue that the members of the Union may not join in one cause of action for

libel, as the damages to reputation which each member might have sustained vary with each member and that such damages would have to be proved separately for each member. However, by statute (General Associations Law, Sec. 12), an action may be maintained by the president or treasurer of an unincorporated association to recover any property or upon any cause of action, for or upon which all of the associates may sue by reason of their interest or ownership therein either jointly or in common. In our opinion, each member of plaintiff union has a common interest in the reputation of the Union. If the business and credit of the Union be destroyed, as well it might be by defamatory statements which falsely charge corrupt and dishonest acts by the Union, each of its 17,000 members is affected equally by the possible loss of position and the loss of protection and benefits furnished by the Union. Each member has a common and equal interest in a cause of action to recover damages for injury thus produced. *Stone* v. *Textile Examiners & Shrinkers Employers' Ass'n.*, 137 App. Div. 655, 122 N. Y. S. 460."

The decision in the *Kirkman* case has been applied in a variety of actions thereafter instituted and maintained. In *Lubliner* v. *Reinlib*, 184 Misc. 472, 50 N. Y. S. (2d) 786, suit was instituted by one union against another. In this case not only were the officers sued in their representative capacity, but the unions were designated as parties as though they were separate legal entities. The Court held that there was no need to include the names of the unions in the title of the action. The Court then said:

"In the *Kirkman* case the Court of Appeals made clear that the action could be maintained merely upon a showing of libel of the group only, and not of the members personally and individually. And even before the *Kirkman* decision, this Court had indicated that such a suit was tenable. *National Variety Artists, Inc.* v. *Mosconi*, 169 Misc. 982, 983, 9 N. Y. S. (2d) 498, 499, but cf. *Stone* v. *Textile Examiners & Shrinkers Employers' Ass'n*, 137 App. Div. 655, 122 N. Y. S. 460."

The error into which the Union falls is to confuse joint liability with individual participation. But Section 13 is plain. If the members are liable jointly, action may be maintained against the Union in the name of a president or treasurer even though each of the members did not participate in the complained-of act.

The language "jointly or severally" contained in Section 13 is disjunctive, implying that suit may be maintained against the Union in the name of the president or treasurer in either of two events: (a) when each of the members are severally liable because of individual participation in a complained-of act or (b) if the members are jointly liable because of an act which an agent was authorized and did perform. It is plain here that the liability of the members of Petitioner Union is joint and the common treasury can be reached by an action maintained against the president or treasurer.

Finally, the provisions of Section 13 are procedural, they effect no changes in the substantive law, and hence no reviewable question is presented.

Lubliner v. *Reinlib*, 184 Misc. 472, 50 N. Y. S. (2d) 786.

POINT III.

The arbitration agreement was binding on the members of the Union and the constitutionality of arbitration statutes is now well-established.

Concededly, the members of the Petitioner Union ratified the collective bargaining agreement and are therefore estopped from denying its validity. Only by advancing the now rejected and abandoned theory that a collective bargaining agreement is essentially a treaty between two sovereignties, not binding upon the constituent members of the contracting parties, can Petitioners support the notion that a collective labor contract is binding only upon union members employed by the Respondent. But it is important to observe first, that a collective labor agreement is enforceable in the same way as any other contract and second, the liability asserted here is a joint liability arising out of a matter of common interest and concern to all of its members.

Section 1448 of the Civil Practice Act of New York provides:

> "A provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies, thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Particularly significant in this connection is the decision by the Court of Appeals in *Application of Devery*, 266 App. Div. 213, 41 N. Y. S. (2d) 293, aff'd 292 N. Y. 596, 55 N. E. (2d) 370, which involved the instant contract, this Petitioner Union and the same arbitrator. There, the proceeding was initiated by a letter addressed to the attorney for the employer, by the attorney for the union (41 N. Y. S. [2d] 293, at p. 296). Indeed, in the letter written by the attorneys for the Union the word "arbitration" nowhere appears. Despite the fact that the letter by which the arbitration proceeding was initiated merely expressed an opinion that the matter was one cognizable by Mr. Sheridan as Impartial Chairman, the Appellate Division for the First Department held:

> "By the terms of the collective agreement such as that existing here, there is created an exclusive method of arbitrating all disputes between members of the Union and the association. Where the parties are unable to agree upon any question, the controversy is referred to a permanent arbitrator known as the impartial chairman. His decision is final and binding upon the parties. This court has heretofore upheld the validity of similar collective agreements. *Goldman* v. *Cohen*, 222 App. Div. 631, 227 N. Y. S. 311; *Schlesinger* v. *Quinto*, 201 App. Div. 487, 194 N. Y. S. 401; *Matter of Sun-Ray Cloak Co. Inc.*, 256 App. Div. 620, 623; 11 N. Y. S. (2d) 202. See, also, Section 1448, Civil Practice Act as amended by Laws of 1940, Ch. 851" (at p. 295).

And that arbitration awards are enforceable in the State Court is now too well-settled to warrant extended exegesis.

Under Section 1448 of the Civil Practice Act, an award in an arbitration proceeding is enforceable if (1) the arbitration agreement was founded upon a valid and existing contract, (2) the subject matter of the arbitration proceeding and the arbitration award were contemplated by the arbitration agreement, (3) the dispute was submitted to the Arbitrator and (4) the Arbitrator rendered and presented an award in the form and manner required by Statute. And an arbitration award may be set aside only (1) if procured by corruption, fraud or other undue means; or (2) there was evident partiality or corruption on the part of the Arbitrator; or (3) the Arbitrator was guilty of misconduct; or (4) there was neither a valid contract to arbitrate nor an effective submission to arbitration; or (5) the Arbitrator exceeded his powers or so imperfectly executed them that a mutual, final and definite award on the subject matter submitted was not made.

There being (1) a contract to arbitrate "any and all disputes"; (2) a dispute submitted pursuant to that contract, to the Arbitrator, and (3) an award, it is incontrovertible that the award was enforceable. Thus, it has been held:

> "Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either a sto the law or the facts is final and conclusive, and a Court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in the agreement of submission authorizing it. The award of an arbitrator cannot be set aside for mere errors of judgment either as to the law or as to the facts. If he keeps within his jurisdiction, and is not guilty of fraud, corruption, or other

misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment, and however disappointing it may be the parties must abide by it."

Matter of Wilkins, 169 N. Y. 494, 496, 61 N. E. 575.

See too:

Shirley Silk Co. Inc. v. *American Silk Mills, Inc.,* 257 App. Div. 375, 13 N. Y. S. (2d) 309; See n. 17 N. Y. U. L. Q. Rev. 659 (1940);

Delma Engineering Corporation v. *John A. Johnson Contracting Corporation,* 267 App. Div. 410, 45 N. Y. S. (2d) 913;

S. A. Wenger & Co. Inc. v. *Propper Silk Hosiery Mills, Inc.,* 239 N. Y. 199, 146 N. E. 203.

In *Pine Street Realty Co., Inc.* v. *Coutroulos,* the Appellate Division for the First Department, 233 App. Div. 404, 253 N. Y. Supp. 174, 177, app. den. 258 N. Y. 609, 180 N. E. 354, it was held:

"Where parties select an arbitrator to pass upon a controversy arising between them, his determination, both as to the law and as to the facts, is not reviewable as though the matter were conducted according to the law of the land in a judicial court. Mere errors of judgment found no ground upon which to set his determination aside. He has merely to keep within the submission of the controversy and avoid fraud, corruption, or misconduct, affecting his award, to render it impregnable. It becomes final excepting where grounds exist, as specifically provided in the Civil Practice Act, Section 1457, for vacating an award. Errors,

> mistakes, departures from strict legal rules, are all included in the arbitration risk and 'perverse misconstruction' includes none of these in its category. See: *Matter of Wilkins,* 169 N. Y. 494, 496, 62 N. E. 575."

See, too:

Friedheim v. *International Paper Co.,* 265 App. Div. 601, 40 N. Y. S. (2d) 144;
C. Itoh & Co. Limited v. *Boyer Oil Co. Inc.,* 198 App. Div. 881, 191 N. Y. Supp. 290;
Stefano Berizzi Co., Inc. v. *Krausz,* 208 App. Div. 322, 325, 203 N. Y. Supp. 442, 444.

To charge, as do petitioners, that they were denied due process because of the alleged failure to give notice of the arbitration hearing is not only an incorrect statement of fact but without merit as a legal objection.

Equally untenable is the claim that the arbitration proceedings amounted to a denial of due process. Thus, in *Hardware Dealers Mutual Fire Insurance Company of Wisconsin* v. *Glidden Company,* 284 U. S. 151, 76 L. Ed. 214, the Appellant, an insurance corporation, licensed to write fire insurance policies in Minnesota issued a policy insuring the appellees' assignor against loss, by fire, of personal property. Minnesota, by statute, required all fire insurance companies licensed to use a standard form of policy which provided for arbitration of the amount of any loss, with certain exceptions. A loss having occurred, the insured appointed an arbitrator and demanded that the amount of loss be determined by arbitration. The appellant refused to participate in the arbitration and the assured procured the appointment of an umpire to act with the arbitrator designated by the insured. The arbitrator and umpire proceeded to determine the amount of loss and made their award. The appellant set up by way of defense

that the requirement that the appellant employ an arbitrator infringes the due process and equal protection clauses of the 14th Amendment. In short, the appellant contended that its freedom of contract was restricted by the Minnesota statute. The question decided by the Supreme Court was whether the 14th Amendment precluded the exercise of such compulsion by the State Legislature. The Supreme Court held (at p. 157):

> "The right to make contracts embraced in the concept of liberty guaranteed by the 14th Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

And the Court found (at p. 158):

> "The present statute substitutes a determination by arbitration for trial in court of the single issue of the amount of loss suffered under a fire insurance policy. As appellant's objection to it is directed specifically to the power of the state to substitute the one remedy for the other, rather than to the constitutionality of the particular procedure prescribed or followed before the arbitrators, it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The 14th Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40."

As for the constitutionality of the arbitration law, Petitioners unfortunately rely upon decisions relating to an arbitration statute now superseded by the present

New York Act. Indeed, the decision in *Schafran & Finkel, Inc.* v. *M. Lowenstein & Sons, Inc.*, 280 N. Y. 164, 19 N. E. (2d) 1005 upon which petitioners build their fragile case stands squarely for principles which expose the weakness of the petitioner. Even under the former arbitration law of New York, the enforcement of an award would not be barred where, as here, there was a contract to arbitrate or where the parties participated, as they did here, in the selection of the arbitrator or in any of the proceedings before him.

The present Arbitration Law of New York has been upheld by the Court of Appeals. In *Berkovitz et al.* v. *Arbib and Houlberg, Inc.*, 230 N. Y. 261, 130 N. E. 288, the Court held that the arbitration statute neither denies due process nor impairs the obligations of contracts nor curbs the powers of the Court. Thus, the Court, by Cardozo, *J.*, held:

> "The statute is assailed as inconsistent with Article 1, Section 2 of the Constitution of the State, which secured the right of trial by jury. The right is one that may be waived" (p. 273).

And, again:

> "Jurisdiction (of the Supreme Court) is not renounced, but the time and manner of its exercise are adapted to the conventions of the parties restricting the media of proof" (p. 275).

And, further:

> "Finally, the statute is said to violate Article 1, Section 10 of the Constitution of the United States * * *. There is no merit in the contention. The obligation of the contract is strengthened, not impaired" (p. 276).

See, too,

Finsilver, Still & Moss, Inc. v. *Goldberg, M. & Co., Inc.*, 253 N. Y. 382, 390, 171 N. E. 579.

POINT IV.

The denial of a trial of the issue of the claimed corruption of the arbitrator did not amount to a denial of due process.

Although the New York Arbitration statute provides that an award may be vacated if procured by fraud or corruption if arbitrator has been guilty of evident partiality or corruption, a mere accusation of corruption or fraud, such as petitioners make, does not give rise to a right of a trial of the charge.

In *Everett* v. *Brown*, 120 Misc. Rep. 349, 198 N. Y. S. 462, the Court held, at page 466, that:

> "The partiality of an arbitrator must be clearly shown before the Court will set aside his award for that reason. The burden of showing partiality rests on the party making the charge. Defendants have not, in my opinion, sustained their charge."

See, too,

Shirley Silk Co. Inc. v. *American Silk Mills, Inc., supra;*
Matter of Friedheim v. *International Paper Co., supra.*

And it has also been held that an arbitrator's errors of judgment cannot support a charge of bias.

Pine Street Realty Co. v. *Coutroulos, supra;*
Matter of Wilkins, supra.

POINT V.

The petitioners were not denied the equal protection of the laws.

Petitioners urge that the award imposes upon the Union a peculiar species of liability and is, accordingly, discriminatory against workmen as a class. This contention is palpably without merit. Section 13 of the General Associations Law of New York is applicable to suits by and against such a variegated group of unincorporated associations as the New York Stock Exchange, a trade union, a County Committee of a political party, a partnership having a president and treasurer, and a veterans' organization, among others.

> *Sewell* v. *Ives,* 61 How. Prac. (N. Y.) 54;
> *96 Fifth Avenue Corporation* v. *Greenberg,* 180 Misc. 614, 44 N. Y. S. (2d) 231, aff'd 181 Misc. 142, 47 N. Y. S. (2d) 222;
> *Conklin* v. *Mezzano,* 46 N. Y. S. (2d) 281.

Clearly, then, a businessmen's association is no less liable for its torts and breaches of contract than a trade union and, under Section 13 of the General Associations Law, precisely the same judgment may be rendered against the two unlike organizations. To read into Section 13 a theory of historical materialism is to strain the technique of dialectics.

Equally insupportable is the suggestion by Petitioners that the recent opinion of the New York Court of Appeals in *Western Union Tel. Co.* v. *American Communications Ass'n, C. I. O.,* 299 N. Y. 177, 86 N. E. (2d) 162, demonstrates the dichotomy of one principle of law for employers and another for trade unions. In the case cited by Petitioners the power of the arbitrator was rigorously

circumscribed; in the instant case, all disputes and grievances, without limitation, were committed to the arbitrator for decision. Where parties confer upon an arbitrator wide and unlimited powers, his decision is binding and conclusive; where his powers are limited, his award must fall within the boundaries of his prescribed authority. This distinction, Petitioners, unfortunately, overlook.

POINT VI.

The Norris-La Guardia Act is not binding upon State Courts nor does it establish a national policy that has become an integral part of State Law.

There are two fundamental and decisive difficulties with Petitioners' contention here. Neither the Norris-LaGuardia Act nor Section 876 (a) of the Civil Practice Act prohibits the making of the contract providing for arbitration leading to an award of damages against a Union.

The limitations of the Norris-LaGuardia Act "are upon all courts of the United States in all matters growing out of labor disputes covered by the act which may come before them".

> *United Brotherhood of Carpenter and Joiners of America* v. *United States,* 330 U. S. 395, 91 L. Ed. 973;
>
> *Allen-Bradley Co.* v. *Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U. S. 797; 89 L. Ed. 1939;
>
> *United States* v. *American Federation of Musicians,* 318 U. S. 741, 87 L. Ed. 1120.

In the *United Brotherhood* case, *supra,* this Court discussed at length the implications of Section 6 of the Norris-LaGuardia Act. Thus, says this Court (at pp. 409-10):

"Certainly an association or organization cannot escape responsibility by standing orders disavowing authority on the part of its officers to make any agreements in violation of the Sherman Act and disclaiming union responsibility for such agreements. Facile arrangements do not create immunity from the act, whether they are made by employee or employer groups. The conditions of liability under Section 6 are the same in the case of each. The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages and working conditions may well be sufficient to make the union liable."

See, too,

Mayer Brothers Poultry Farms v. *Ely Meltzer* 274 App. Div. 169, 78 N. Y. S. (2d) 842;
International Longshoremen's & Warehousemen's Union, C. I. O. v. *Wirtz,* 170 F. (2d) 183.

POINT VII.

The petition must be denied because it is defective in form and raises no reviewable issues of fact or law.

Rule 12 of the Rules of the Supreme Court prescribes that where review is sought of a decision of a State Court the petition shall set forth the manner in which the "federal questions sought to be reviewed were raised". Nowhere is such a statement made in the petition. Nor is the supporting brief "direct and concise" as provided for in Rule 38.

Even more fundamentally defective is the evident fact that there is no showing of a denial of a federal right specifically set up or asserted in the State Court. A bare claim of a federal right does not cure this defect.

Wilson v. *North Carolina,* 169 U. S. 586, 42 L. Ed. 865;
Missouri Pacific Railroad Company v. *Clarendon Boat Oar Company, Inc.,* 257 U. S. 533, 66 L. Ed. 354.

Indeed, if it were assumed, *arguendo* that a federal question was presented, it does not appear, from the record, that its decision was necessary to a determination of the cause in the New York Court. Accordingly, the petition must be denied.

Hoyt v. *Shelden,* 66 U. S. 518, 17 L. Ed. 65;
White River Lumber Co. v. *State of Arkansas,* 279 U. S. 692, 73 L. Ed. 903, reh'g den. 50 S. Ct. 78;
Municipal Investors Ass'n v. *City of Birmingham,* 316 U. S. 153, 86 L. Ed. 1341.

Petitioners' contentions amount to a prayer that this Court construe a State statute notwithstanding the principle that the Supreme Court will accept the construction given to the statute by the State Court.

S. R. A. Inc. v. *State of Minnesota,* 327 U. S. 558, 90 L. Ed. 851;
Williams v. *Kaiser,* 323 U. S. 471, 89 L. Ed. 398;
Cohen v. *Beneficial Industrial Loan Corporation* (1949) .... U. S. ...., 17 U. S. L. W. 4530;
Arthur Termaniello v. *City of Chicago* (1949), ...U. S. ...., 17 U. S. L. W. 4395.

And since the Petitioners direct their attack upon the judgment here it may be well to point out that the

"* * * scope and effect of a state judgment is peculiarly a question of state law, and therefore a

decision relating only to such subject involves no federal question."

Kenney v. *Craven*, 215 U. S. 125, 54 L. Ed. 122.

Nor does "the due process clause of the Fourteenth Amendment * * * control methods of procedure * * * "

McDonald v. *Oregon Railroad & Navigation Company*, 233 U. S. 665, 58 L. Ed. 1145.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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